No. 48740-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

SAMUEL VALDEZ, Appellant.

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Appeal from the Superior Court of Wahkiakum County
The Honorable S. Warning
No. 15-1-00200-4

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# BRIEF OF APPELLANT SAMUEL VALDEZ

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions



Statutory Provisions



Rules

## I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the motion for a change of venue.
2. The trial court's denial of the motion to dismiss the arson charge for insufficient evidence and lack of corpus delicti, was error.
3. The jury's verdict of guilty on the possession of marijuana with intent to manufacture or distribute, without sufficient evidence, was error.
4. The prosecutor's misconduct in misstate the burden of proof and reasonable doubt, was error.
5. The trial court's admission of prior bad acts, was error.
6. The prosecutor's misconduct in giving personal opinions on the witnesses' veracity, was error.
7. The prosecutor's misconduct in impugning defense counsel, was error.
8. The prosecutor's misconduct in telling the jury that Mr. Valdez was incarcerated, was error.
9. Defense counsel's failure to object to the State's misstatement of the burden of proof and reasonable doubt, was error.

10. Defense counsel's failure to object to the admission of prior bad acts under ER 404(b), was error.
11. Defense counsel's failure to object to the State's comments on Mr. Valdez's veracity and calling him a liar, was error.
12. Defense counsel's failure to object to the State's argument, stating a personal opinion, was error.
13. Defense counsel's failure to object to the State's impugning defense counsel, was error.
14. Defense counsel's failure to object to the State telling the jury that Mr. Valdez was in custody, was error.
15. The denial of the right to a fair trial, based on cumulative error, was error.
16. The imposition of legal financial obligations, without adequately considering Mr. Valdez's ability to pay, was error.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does it violate due process to deny a change of venue when a defendant is charge with solicitation to commit murder, there is significant pre-trial publicity, including regarding allegations that were not charged, in a very small county where the total population is just over 4,000, where almost

all of the potential jurors know about the case, have read pre-trial publicity, and/or know witnesses in the case, and where the prosecutor and a officers made statements to or provided information to the media, including where an officer said the recordings of the defendant were chilling and that the officers were "shocked by [the defendant's] malice"?

2. May a court consider a defendant's statements in determining whether or not the State has presented sufficient evidence of, when there is no other evidence that a fire was intentionally set and where the fire investigators' conclusion was that the cause of the fire was undetermined?
3. When a defendant makes statements that could be considered admissions to starting a fire, but there is no other evidence that the fire was the cause of arson, other than that the defendant was upset with the victims of the fire, should the arson charge be dismissed?
4. Is there sufficient evidence that a defendant possessed marijuana with the intent to manufacture or deliver on a particular date when the defendant was previously involved

in the manufacture and/or delivery, but had sold equipment to a legal marijuana business and had no intention to continue his own business on the date charged?

5. Are uncharged prior bad acts that a defendant was in a plane crash, car accident, had plans to burn a neighbor's catamaran, and tried to clog a neighbor's culver admissible when the trial court made no finding that the prior acts actually occurred, what the basis for admitting them was, their relevance, and did not weight their probative value and prejudice?
6. Does a prosecutor commit ill-intentioned and flagrant misconduct when they argue misstate reasonable doubt, arguing that reasonable doubt requires more than speculation or a possibility, and where the prosecutor argues that a defendant's denial cannot constitute reasonable doubt?
7. Does a prosecutor commit ill-intentioned and flagrant misconduct when they argue misstate the burden of proof, arguing that the defendant did not prove anything?
8. Does a prosecutor commit ill-intentioned and flagrant misconduct when they call the defendant a liar and a

defense witness shameful?

9. Does a prosecutor commit ill-intentioned and flagrant misconduct when they impugn defense counsel, arguing that the defense arguments regarding bias and credibility are all a diversion, like throwing a big rock, and that the defense arguments were as likely as a strike of lightening.
10. Is it unreasonable and ineffective for defense counsel to fail to object the admission of the defendant's statements, which could be construed as a confession to arson, when there is no independent evidence that the fire was intentionally started?
11. Is it unreasonable and ineffective for defense counsel to fail to object the admission of prior bad acts under ER 404(b), in addition to arguing that they were irrelevant?
12. Is it unreasonable and ineffective for defense counsel to fail to object to the State misstating the burden of proof and reasonable doubt in closing argument?
13. Is it unreasonable and ineffective for defense counsel to fail to object to the State calling the defendant a liar and a defense witness shameful in closing argument?
14. Is it unreasonable and ineffective for defense counsel to fail

to object to the State telling the jury that the defendant is incarcerated?

15. May a trial court impose legal financial obligations based on trial testimony that the defendant owns property and has assets, without taking into consideration the defendant's legal fees, debts, age, lengthy incarceration, and finding of indigency?

## III. STATEMENT OF THE CASE

1. Venue

Mr. Valdez was charged in Wahkiakum County with solicitation to commit murder in the first degree, arson in the first degree, delivery of marijuana, and possession with intent to deliver or manufacture marijuana. (CP 390-92).

Prior to trial, Mr. Valdez moved for a change of venue, arguing that the pre-trial publicity in this case, which was significant, involved well-known individuals, and which contained inaccurate information, made it impossible for Mr. Valdez to get a fair trial in such a small community. (CP 21-47). Mr. Valdez attached fourteen articles to his motion. (CP 27-47).

The population in Wahkiakum County is approximately 4,067

people; 17.3% of the population is under 18 years old.[1] Thus, there are approximately 3,300 people who may be eligible jurors. The year prior to this case proceeding to trial, Mr. Valdez run for county assessor, winning five percent of the vote. (CP 27, 30, 37). There was extensive news coverage of this case, including allegations that Mr. Valdez had hired a hit man not only to kill his ex-wife, but to kill Superior Court Judge Michael Sullivan, attorney William Faubion, and others. (CP 27, 30, 34, 35, 37, 44). The coverage alleged that Mr. Valdez asked to have six people killed, although he was only charged with one count of solicitation to commit murder regarding his ex-wife. (CP 28, 31). The coverage was based on documents provided by the prosecuting attorney. (CP 27, 30). It also included statements that after listening to the recordings of Mr. Valdez's conversations in this case officers were "shocked by Valdez's malice" and a statement from the sheriff that the recordings were chilling. (CP 28, 31).

Mr. Valdez argued that given the publicity, that he and others involved in the case were well-known in the community, and that Wahkiakum County is a small area, he could not get a fair trial. (RP 43-44, CP 21-16). The State had no objection to changing venue. (RP 44). However, the court reserved ruling on the motion to change venue,

[1] Population 4,067 in 2014. Wahkiakum County Profile, by Scott Bailey, regional labor economist, Washington State Employment Security Department (updated February, 2016), available at https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profiles/wahkiakum-county-profile.

deciding to begin with jury questionnaires and jury selection before making a ruling. (RP 45).

The court empaneled a venire of 55 people. (RP 65). The jurors were given questionnaires, asking if they had heard about the case, knew the witnesses, and if they could be fair and impartial. (CP 401-405). It's not entirely clear from the record, but it appears that at least 44 people had heard about the case, including one who fought the fire that was the basis for the arson charge. (RP 64-65). The court excused fourteen jurors for cause based on the questionnaire alone. (RP 65-75).

After reviewing the questionnaires, Mr. Valdez renewed his motion for change of venue:

> [S]o there was a total of 55 jurors . . . . My count in going through these, 32 of them in one way or another have heard about the case, so about two-thirds of the number there. And 40 of the 55 know at least one, most of them more than that, some significantly more than that, of the witnesses in the case. I guess even though in that context minus the ones we've excused, they've indicated that they can be impartial. I'm really concerned about the spillover effect and just the general knowledge of the case and the dynamics of any potential involvement in sitting on this case. It just seems to be a large number to have all those people either know of someone or know the case. It is concerning as far as venue goes. I'd ask the Court at this time to exercise its discretion without going to general jury selection and change venue.

(RP 78-79). The court again denied the motion, deciding to continue with jury selection. (RP 79). However, the court noted that Mr. Valdez could

re-raise the motion for a change of venue. (RP 80). Also, the court decided not to begin with individual questioning, but instead to question the entire panel about their knowledge of the case and witnesses. (RP 80).

During voir dire, several jurors had heard about the case, knew the defendant, and/or knew witnesses involved in the case. (RP 135-193). Six jurors indicated they had seen articles about the case after being empaneled. (RP 169). An Additional eight jurors were excused for cause. (RP 135-195). Twenty-five jurors remained, which included jurors who had heard of the case and/or knew witnesses. (RP 195). Mr. Valdez again renewed his motion for change of venue. (RP 193). The court again denied the motion. (RP 193).

Mr. Valdez used seven peremptory challenges on the remaining jurors. (RP 195-98). The court sat fourteen jurors in total, including two alternates. (RP 195).

The media coverage in this case was on-going; at one point there were reporters in the courtroom. (RP 433). Also, during trial, a juror interrupted the State's questioning of a witness, "Your Honor, Sue, could you speak up? Thank you." (RP 825). The juror was referring to prosecuting attorney Susan Baur, informally, as Sue. It is not clear from the record whether or not the juror knew the prosecuting attorney personally, but that is a reasonable inference. There was no reference to the prosecuting attorney as "Sue" on the record prior to the juror's statement.

2. Marijuana Business

Christopher Horton moved onto Altoona-Pillar Rock Road and become friends with Mr. Valdez. (RP 264-68). Both Mr. Valdez and Mr. Horton grew marijuana. Mr. Valdez testified that he grew marijuana and sold it to dispensaries. (RP 1422). He testified that he had a medical marijuana card and thought it was okay. (RP 1422). Mr. Horton testified that he grew medical marijuana. (RP 272-74).

Mr. Valdez talked to Mr. Horton about marijuana. He discussed buying a machine to extract marijuana oil and going into business with others. (RP 272-73). Mr. Valdez bought a machine to extract marijuana oil, and other equipment, totaling $140,000. (RP 1427). When he bought the machine, Mr. Horton helped him set it up. (RP 285-86).

When recreational marijuana was legalized, there were a limited number of permits that were given out and then there were no more, so Mr. Valdez looked for someone to partner with. (RP 1420). Originally, Mr. Valdez was going to go into business with Lesta, who had a legal marijuana business. (RP 1420). However, that did not work out. (RP 284). After the deal with Lesta fell through, Mr. Horton started going to seminars and talking to Mr. Valdez about starting a legal marijuana business. (RP 734-35). Mr. Horton introduced Mr. Valdez to several people in the marijuana world. He introduced Mr. Valdez to Charlie "Tuna," at ConnaCon. (RP 290-91). Charlie had a pot exchange website. (RP 291-92). He also introduced Mr. Valdez to Fred Anderson, who had

applied for a State license to process and grow marijuana. (RP 292). Mr. Anderson testified that he had conversations about starting a legal marijuana business with Mr. Valdez and Mr. Horton wanted to be involved, but he was not part of their plans. (RP 1311-12).

Mr. Valdez had a business name, website, and cards. (RP 1421-22). The business cards included Mr. Horton's name, and his title was "sales." (RP 323). Mr. Horton testified that he did not know how to run the machine and didn't share in the profits. (RP 286-7). Mr. Horton testified that he put in a lot of labor and leg work helping Mr. Valdez with his marijuana business. (RP 293-94). He hoped that if Mr. Valdez was successful, he hoped to benefit from it. (RP 293). But, he denied that they were partners or that he expected to make any money from helping Mr. Valdez. (RP 293). Later, Mr. Horton admitted that he thought they were partners. (RP 700).

Mr. Valdez ended up selling or leasing his equipment to Reece, who had a license for marijuana. (RP 293, 1399). Mr. Valdez moved the oil machine to Reece's shop in Long Beach in May of 2015. (RP 293, 1399). Vancouver Weed, Gary Green, and Reece Carpenter were licensed to produce and process marijuana, effective June 15, 2015. (RP 1104-07). There is no record that Mr. Valdez or anyone at his address ever applied for a marijuana license. (RP 1108).

In March, 2015, Mr. Horton's friendship with Mr. Valdez deteriorated. (RP 305). In part, Mr. Horton was upset with Mr. Valdez's

relationship with Rocky Rhodes. But, he also was upset about not being included in the marijuana business. Mr. Horton texted Mr. Valdez on March 16, 2015:

> Caught up in my own. We were going to be partners but it's become quite clear to me that you're going about things on your own. Not enough pieces of pie. I feel like all the effort I put into work, busy. As for Rocky, if you had any value to our relationship or my opinion, you would not – you would have -- you would not have snitches around. You're welcome to put yourself in harm's way, but I'm not putting myself in that kind of a situation. We'll chat in person, but I have to work. Have a nice day.

(RP 310). The same day, Mr. Valdez wrote:

> I'm a little confused. We are partners. As far as the juicer goes, it's moving to a safe place. That frees us up to do other -- other things. Besides that, you just dropped off the face of the earth and all of a sudden I wake up to this. Are you okay? I hope so.

(RP 710).

Several other texts followed. (RP 313-14). On March 20, 2015, Mr. Valdez texted Mr. Horton, thanking him for helping him get started and for his advice, and then saying he is in the fast lane, moving on, until we meet again. (RP 315-16). Mr. Horton replied, "Don't leave me behind." (RP 316).

On May 12, 2015, Mr. Horton went to Mr. Valdez's house and Rocky Rhodes was also there. (RP 1393-94). On the same day, Mr. Horton texted Mr. Valdez about Rocky Rhodes:

> He's a fucking stoolie. Believe who you want. But that was -- that was a fucked-up situation to put me in. Thanks, friend. All I was ever doing was looking out for you and it backfired. Now I know where we stand.

(RP 711). Mr. Valdez responded, "You have lost your mind if you think that was a setup. I'm good, but I'm not that good. Chill." (RP 711). Mr. Horton responded, "Chill out. Tell you what. If I catch you in my neighborhood again, it will be a lot different for everyone involved. See you around." (RP 711).

Sometime in 2015, Mr. Horton asked Mr. Gollersrud if he could use his cannery for a grow operation. (RP 1278-79).

After he was arrested, Mr. Valdez told the police that he had sold his machine to a legal marijuana company and that he no longer is involved in any illegal marijuana business. (RP 1193, 1198). He told the police where the machine was and then they located it at Vancouver Weed. (RP 1223).

3. Mr. Horton Goes to the Police

In late April or early May, Mr. Horton called the police to report that Mr. Valdez had an illegal drug business. (RP 978-79). The call was forwarded to Detective Thoma, with the drug task force. (RP 797). It took five to six weeks to contact Detective Thoma. (RP 980). During that time, Mr. Horton called back several times. (RP 989-90). After several calls, Mr. Horton added that Mr. Valdez was also involved in a fire and wanted to kill his ex-wife. (RP 980).

On May 12, 2015, Detective Thoma learned about Mr. Horton's call, reporting that someone was making large amounts of marijuana oil. (RP 1139). After Detective Thoma called Mr. Horton, he added that Mr. Valdez also wanted to kill his ex-wife. (RP 1140).

Detectives Thoma and Yund met with Mr. Horton and decided to get a wire and record Mr. Horton's conversations with Mr. Valdez. (RP 357). Three conversations between Mr. Horton and Mr. Valdez were recorded.

4. Divorce

Samuel Valdez and Elizabeth "Beth" Robbins were married in 2002. (RP 220). During their marriage, they lived on Mr. Valdez's property on Altoona-Pillar Rock Road, where they built a shop with an apartment on top. (RP 221-22). In 2012, Mr. Valdez asked for a divorce and Ms. Robbins moved back to Hood Canal. (RP 226).

Mr. Valdez and Ms. Robbins owned a lot of property. (RP 228-9). They could not come to an agreement on how to divide their property, so the matter went to trial. (RP 228-30). Their neighbors, Fred and Kathy Cantrell[2], testified at trial, on behalf of Ms. Robbins, that Mr. Valdez declined to move rock for them and over-bid on work for them, so he was not hired. (RP 230, 924, 970).

[2] At the time of trial, Mrs. Cantrell had been married and her name was Kathy Cantrell. At the time of the allegations, her name was Kathy Hamilton. For consistency, she will be referred to as Mrs. Cantrell in this brief.

The divorce was finalized on July 1, 2014. (RP 232). Mr. Valdez appealed the decision from the trial court regarding the divorce. (RP 1396). Mr. Valdez was unhappy and thought the distribution of property was unfair. (RP 1396). He was upset and called Mrs. Robbins names after the trial. (RP 1435-36). He attempted to talk to Ms. Robbins about the terms of the divorce and reach an agreement; he wanted the property across the street that was awarded to her and thought that he could offer her the plane, annuity, and/or IRA in exchange and they could work something out. (RP 1445). On July 6, 2014 he sent her an email:

> Hello, Beth. Congratulations on your win in court. We had a good life and I would like for us to be able to move on and being to remember the good times instead of having animosity from one another. I have received your list of items. You are welcome to come by any time and pick them up.

(RP 1446). Ms. Robbins testified that Mr. Valdez came to her house and brought her some of her property. (RP 246-47). Mr. Valdez testified that he brought her property on several occasions. (RP 1380). During one of these trips, he took a photo or photos of her house. (RP 1381). At one point, Mr. Valdez came to her house and she felt uncomfortable and asked him to leave; he did. (RP 235). She also asked him not come to her house again; he didn't. (RP 261).

At some point, Ms. Robbins went to the property she was awarded in the divorce, across the street from Mr. Valdez's residence, to take pictures. (RP 236). She testified that Mr. Valdez came over, threw apples

at her car, reached for a rock, she pulled out a camera, and he dropped the rock. (RP 237). She then drove to a neighbors, Mr. Valdez followed her, and they exchanged words. (RP 238). Mr. Valdez testified that Ms. Robbins was on his property, not the property she was awarded, that he tried to talk to her and be friends, but she refused to speak to him and said they weren't friends; he got angry and threw an apple at her car out of frustration. (RP 1378-79). He denied ever grabbing a rock. (RP 1378). Mr. Valdez testified that he followed her because he felt bad for throwing the apple and wanted to apologize. (RP 1416). Mr. Valdez and Ms. Robbins did not have any contact after this incident. (RP 241).

Mr. Horton testified that Mr. Valdez was angry about divorce. (RP 352). It was a violent anger and he wanted to get back at his ex-wife and anyone who testified. (RP 326). Cheryl Dutcher testified that Mr. Valdez was angry and called Ms. Robbins names right after the divorce, but that was the only time she saw him angry. (RP 1111). Mary Ann Bruneau testified that Mr. Valdez was angry and upset about the divorce, he called Ms. Robbins names, and he cried during their conversations. (RP 996-1000). Leon Gollersrud testified that Mr. Valdez was not angry about the divorce. (RP 1276). Robert Maple testified that he was at a 4th of July party and Mr. Valdez said that he wished someone would shoot his wife because she's taking everything in the divorce. (RP 1032-33). Mr. Maple didn't think anything of it because people going through a divorce often want to kill each other; he didn't take it seriously. (RP 1032-33).

5. Fire

About a week after the divorce was finalized, on July 9, 2014, Mr. and Mrs. Cantrell's house burned down. (RP 234, 874). Several neighbors came to see the house. (RP 940). Mr. Valdez was told that there had been a fire and he went to see the house that morning. (RP 1386-87). While he was there, he spoke to Mr. McGuire and asked if anybody had been killed. (RP 897-98). Mrs. Cantrell suspected Mr. Valdez and told the fire chief, Ms. Robbins, and several neighbors that she thought Mr. Valdez was responsible. (RP 953).

Leon Gullersrud had gone to Mr. and Mrs. Cantrell's house a couple days before the fire and was upset with them about testifying against Mr. Valdez. (RP 961-62). Right after the fire, Mr. Gullersrud went to a neighbors' house, where Mr. and Mrs. Cantrell were staying, and kept saying, "I didn't do it." (RP 942).

There was an arson investigation, but they could not determine where the fire started and there was no evidence that it was set intentionally. (RP 1087-89). Therefore, the cause was "undetermined." (RP 1093).

Mr. Horton testified that Mr. Valdez told him that he burned down the house. (RP 327). He testified that Mr. Valdez had come over before the fire with a soda bottle, match sticks, and cotton. (RP 328). Mr. Horton testified that Mr. Valdez also had ground hamburger and rat poison

to quiet the dogs. (RP 3285). However, the dogs were in the house, not outside, and they died in the fire. (RP 943, 1075).

On the wire recordings, Mr. Horton said that he talked to his uncle and told him he could trust Mr. Valdez because "I witnessed him burning down the neighbor's house. I witnessed attempted murder there. . . . I've witnessed it with multiple neighbors and with multiple instances." (RP 392-3). Mr. Valdez does not confirm or deny whether or not that is true. (RP 392-93). However, Mr. Horton did not witness Mr. Valdez burn down the house. (RP 328-29).

In this same conversation, Mr. Valdez says, regarding his ex, "I want to tell her, 'Well, I've tried to send you some messages. By the way, how's Kathy in her new house doing,' you know?" (RP 394). Mr. Horton asks Mr. Valdez about the fire several times. (RP 395-96). Mr. Valdez never says he started the fire, but talks about sending a message to his ex. (RP 395). Mr. Horton apologized in the wire to Mr. Valdez, talking about how he had trusted him with a lot of things, including telling him that he had burned down the neighbor's house, but he didn't trust him about Rocky, and apologized for their fight. (RP 422-23). Mr. Horton said he'd defended Mr. Valdez to their neighbors who thought he burned down the house. (RP 423-24). Mr. Valdez accepted the apology; he did not say anything about the fire. (RP 423).

At the end of the State's case, Mr. Valdez moved to dismiss the arson charge because there was no evidence that the fire was intentionally

set and a confession cannot be used without evidence that a crime had been committed. (RP 1247). The court denied the motion, holding that the fire and the defendant's statements together were sufficient:

> Here we have the fact of the fire, and at this point certainly a lack of information on how it started, but we know the fact of the fire and statements attributable to the defendant in those tapes that's certainly argued to be equivocal. But I think the common fact of the fire and those statements that can be argued to state his responsibility under that relatively recent Court of Appeals opinion are sufficient. So I'll deny the motion.

(RP 1248).

6. Other Bad Acts.

Several other uncharged incidents, alleging that Mr. Valdez attempted to or planned to harm other neighbors, were admitted into evidence.

a. *Plane and Car Accident.*

Mr. Horton testified that Mr. Valdez got angrier and angrier about the divorce and then crashed his plane and was in a car accident. (RP 277-78). He testified that the plane wreck was one of the reasons he was concerned about Mr. Valdez's anger and went to the police. (RP 353). Mr. Valdez testified that he was trying to take off, there was a tailwind, and the propeller went into the sand. (RP 1384-85). This wasn't the only time something like this happened with his plane. (RP 1384). In closing argument, the State argued that the plane and car accidents were evidence of his anger. (RP 1569).

Mr. Valdez objected, arguing the plane crash was irrelevant. (RP 277-78). The court said, "I'll allow it." (RP 278).

b. *Wanted to Burn Bruneau's Catamaran.*

Mr. Horton testified that Mr. Valdez wanted to burn the Bruneau's catamaran. (RP 332). He testified that he and Mr. Valdez paddled a boat down to the Bruneau's, Mr. Valdez took pictures of their house, and then bragged about it. (RP 333, 344). There was a photo of the catamaran admitted into evidence, but Mr. Horton testified that the boat in the picture is not how the boat looked at the time. (RP 333). But, he testified that Mr. Valdez told him he took that photo that wad admitted into evidence. (RP 334). Mr. Valdez objected, arguing that this testimony was irrelevant. (RP 344-45). The court simply stated, "I'll allow it." (RP 345)

c. *Clogged Bruneau's Culvert.*

Mr. Horton testified that Mr. Valdez planned to clog a culvert so that the water would rise and flood the Bruneau's property because he was mad at them for taking Ms. Robbin's side in the divorce. (RP 349-51). Mr. Horotn testified that Mr. Valdez clogged the culvert and he unclogged it twice. (RP 352). He testified that he never reported this to police because it was his word against Mr. Valdez. (RP 352).

Mr. Valdez testified that he may have discussed a culvert with Mr. Horton. (RP 1404-05). However, he testified that he talked to the county about moving a culvert, that was his property at the time, and then filled it with cement. (RP 1404-05).

Mr. Valdez also objected to this testimony as irrelevant. (RP 348-49). The court stated, "Go ahead and ask this question. But, then we need to move on." (RP 349).

7. Solicitation to Commit Murder

According to Mr. Horton, there was an appeal hearing coming up and Mr. Valdez got more and more angry, which prompted Mr. Valdez to want to kill his ex-wife. (RP 332). However, the appeal was not decided until after Mr. Valdez was arrested. (RP 1370). Mr. Horton testified that Mr. Valdez talked about killing his ex-wife and asked Mr. Horton if he knew anyone who could fulfill his request. (RP 437). Mr. Horton testified that he made up that he had an uncle in the mafia because he feared that Mr. Valdez would find someone. (RP 437-38).

Larry Adams testified that Mr. Horton is his wife's nephew, he's known him since he was young and helped raise him, and his reputation in the community is that he has no credibility. (RP 1354-57). Mr. Adams also testified that Mr. Horton has on more than one occasion brought up that he could have people taken care of. (RP 1359). Glenn Trusty also knows Mr. Horton. (RP 1361). He testified that Mr. Horton offered to kill someone twice and that Mr. Horton brought it up on his own each time. (RP 1364).

Mr. Valdez denied trying to have his ex-wife killed. (RP 1371). He testified that he had several conversations with Mr. Horton about his

uncle getting involved with the marijuana business and distributing the oil on the east coast. (RP 1376). On May 12, 2015, Mr. Horton texted Mr. Valdez, "'FYI, the reason'" – 'the reason come by' -- I suppose the reason I came by this morning, 'is cause my uncle wants to come to town for a full order of two of juice. I wanted you to run them.'" (RP 1396).

Mr. Valdez testified that Mr. Horton originally brought up killing Ms. Robbins. (RP 1400). Mr. Valdez testified that it was scary, but he thought it was a game, like talking about something you know will never happen. (RP 1400). Mr. Valdez testified that he never initiated these conversations; Mr. Horton always brought it up. (RP 1403). Mr. Valdez testified that all the conversations about killing his wife were B.S., bravado, and that he thought Mr. Horton was a hit man and he was just trying to go along, down play it, and he hoped he would go away. (RP 1440, 1484).

a. First Wire: May 20, 2015

The first wire was on May 20, 2015. (RP 365). Most of the wire is Mr. Valdez and Mr. Horton chatting about their lives and marijuana. (RP 369-91). At one point, Mr. Horton brings up a drug bust in New York. (RP 393-84). Mr. Horton talks about how we would get SWAT gear and rob drug dealers. (RP 393). Then they discuss how they would go about robbing drug dealers. (RP 393-94).

Mr. Horton brings up "the list" and a judge. (RP 398). Mr. Valdez then talked about Michael Sullivan, the judge in his divorce trial. (RP

398). Mr. Valdez said the judge needs his ass kicked, but he's not really an issue. (RP 398).

Mr. Horton asks Mr. Valdez about what the next move is. (RP 399). Mr. Valdez says he wants to try to resolve the property issues with his ex:

> I'm trying to work it out. You're welcome to try to help. I mean, you've got good ideas and all that kind of shit. But my thought is to just drive up there, not any time real soon, but whenever I have an opportunity to get back up there. I have friends up there. When I want to go up and visit, I'll just drive right up to her door, knock on the fucking door and say, "Hey, we need to talk," and just put it right on the line, more or less. Say, "Hey, I'm not" -- you know, just say, "I'm not going away ever. Till death do we part. Remember that part, bitch? Until we get this thing resolved in an equitable fashion."

(RP 399-400).

Mr. Horton discusses his uncle, who would be the hit man, coming to town and that the fee would be $10,000 for the first head, $5,000 for each one after that. (RP 401). Mr. Valdez talks about anguishing over whether to kill his ex, but says that wouldn't solve the property dispute. (RP 402-03). He also says he's thought about killing her before and he's had opportunities to kill her, but he decided not to; he decided it would be easier to just get a divorce. (RP 403-04). He also talks about following his ex and slashing her tires. (RP 405).

Mr. Horton again brings up killing her, but Mr. Valdez says he's thinking about the next step and that's what he's come up with so far (confronting her). (RP 406). He goes on to say:

> You know, I'm just not willing to agree and go forward, you know. I think any kind of decision like this just needs to be chewed on a little bit. . . . But I'd like to just – you know, I'm not just not ready to pull the trigger right now on any decision of any kind until I've had a change cot chew on it.

(RP 408). Mr. Valdez says he has six to eight months to wait on the appeal. (RP 411-12).

b. Second Wire: June 16, 2015

The second wire was on June 16, 2015. (RP 489). Mr. Horton and Mr. Valdez discuss marijuana. (RP 486-498).

Mr. Horton brings up his uncle, says his uncle is getting antsy and wants to know if Mr. Valdez wants to go forward or not. (RP 499). Mr. Valdez says he doesn't want to see Judge Sullivan again; he has court in six to eight months and he doesn't want to see his face again. (RP 499).

Mr. Horton brings up payment; he says it's half down, half later. (RP 500). But, then says that Mr. Valdez could buy a plane ticket or put half down. (RP 500-01). Mr. Valdez talks about maybe he should go after the judge instead. (RP 501-02). He also talks about an attorney and his ex being on the "list." (RP 502). He then talks about throwing acid on his ex's face to disfigure her instead of killing her, like they do in the

Middle East. (RP 502). He also discusses dismembering her, instead of killing her. (RP 502). Mr. Valdez asks if he has to give him $5,000 cash; Mr. Horton says he just has to buy a plane ticket, or give cash, or oil. (RP 503).

Mr. Horton and Mr. Valdez then talk about getting marijuana oil to Mr. Horton's uncle to distribute. (RP 503). Mr. Valdez then asks for Mr. Horton's advice, and Mr. Horton says he would just cut ties and move on. (RP 504-05). Mr. Valdez says he wants to table it. (RP 507). He says that as much as he'd like some people to go away, "it's tough for me." (RP 508). He goes on to say, "[N]ot that I will ever be able to carry it out, but I'm really big on keeping my mouth shut and doing my own dirty work." (RP 508). Mr. Valdez says he's moved on. (RP 509-10). And, the day of reckoning will come for a lot of people, whether environmentally, politically, or economically. (RP 510).

Mr. Horton testified that after the second wire, he thought this was done and Mr. Valdez was no longer pursing killing his ex-wife. (RP 517). He testified that Mr. Valdez approached him again, off the wire, and said he was ready to bite the head off the snake. (RP 517).

c. Third Wire: June 23, 2015

The third wire was on June 23, 2015. (RP 528). Mr. Horton and Mr. Valdez discuss print outs. (RP 535). Mr. Horton asks, "So anyway,

you did get the print out? . . . And they just did basically what I said, huh? They just looked it up on the – ." (RP 535). Mr. Valdez responded, "Yeah. That was on the county website there. (RP 535). They go on to talk about going to Mr. Valdez' property and measure where the property line is. (RP 535-36). When they arrive at the property, Mr. Horton asks, "This my paperwork or yours?" (RP 549). Mr. Valdez says, "Well, check it out." (RP 549). They then talk about a compass and go to measure the property. (RP 549-56).

> Mr. Horton brings plane tickets:
>
> MR. HORTON: I looked this morning, and tickets went from $750 to $772.
>
> THE DEFENDANT: Uh-huh. That don't matter. Is that over and above price?
>
> MR. HORTON: Included.
>
> THE DEFENDANT: Well, that's even better.
>
> MR. HORTON: Consider just kind of a solidified down payment kind of a deal. This is all on your property.
>
> THE DEFENDANT: You see the deer right there?

(RP 556-57). And then they talk about deer and the property. (RP 557-56). Mr. Valdez never agreed to a payment or to go forward; the discussion did not specify if the plane ticket was for killing his ex-wife or related to marijuana. (RP 557-64).

Mr. Horton brings it up again, and asks Mr. Valdez about payment for his uncle. (RP 589). Mr. Valdez says oil and they discuss how much oil. (RP 590-91). Mr. Horton says it's a done deal, Mr. Valdez says it was done the day I said do it. (RP 590). Mr. Horton says that he'll go to Mr. Valdez's house to get the oil, and then he'll get the plane ticket for his uncle. (RP 590). Mr. Horton says, "I'll purchase the plane ticket and it will be a done deal and I'll put his thing in the mail. He'll reimburse me when he gets here. So, I'll follow you back to your place. We'll square it away then." (RP 592). Then, they go back to Mr. Valdez's and talk about what kind of oil Mr. Horton wants. (RP 612-13). Mr. Valdez talks about that it's like buying a lottery ticket and says, "what if I really fucking win?" (RP 617).

Mr. Horton testified that Mr. Valdez gave him photos of Ms. Robbins and her house, and oil as payment. (RP 624-25). Mr. Valdez never gave him $5,000 or $10,000. (RP 721). He testified that Mr. Valdez gave him everything while they were driving to or while they were at the property. (RP 624). However, he did not remember a lot of the details. (RP 633-36).

Mr. Valdez testified that the papers they discussed in the truck were survey papers for his property. (RP 1487). Mr. Valdez testified that

he never gave Mr. Horton money, photos, or oil to kill his wife; he only gave him oil to give to his uncle. (RP 1402).

At sentencing, the court commented on Mr. Horton's lack of credibility and the juvenile nature of the conversations on the recordings:

> With regard to the solicitation charge, I guess I need to say ahead of time I'm not in any way making light of it or what Ms. Robbins went through in any way. But as I listened to the testimony and I listened to the tapes, what struck me was what I had to call kind of a juvenile quality to it. It was like two 13-year-olds trying to pump each other up. The story, this hit man who comes out and kills people for no money down. I don't recall the name of the witness, but I agree with the one person who indicated that Mr. Horton's been spreading that foolishness for a long time and nobody else was credulous enough to believe it. Mr. Valdez was the only one who bought into it. I agree with Mr. Valdez that Mr. Horton in general shouldn't be believed. . . . . In large part the tapes sounded like two young people trying to prove to each other what rebels they are. It is very, very strange conversations to listen to, and kind of difficult to decide what to do with it, because on the one hand it is -- as I say, I can only come up with the term kind of a juvenile quality to it. On the other hand, it's about something extraordinarily serious.

(RP 1654-55).

8. Arrest

Mr. Valdez was arrested at his house on July 3, 2016. (RP 780). When Mr. Valdez was arrested, police searched his house. (RP 781). They recovered marijuana oil, cartridges, and vapor cigarettes. (RP 784-85). They also recovered laptops, which had the same photos of Ms. Robbins and her house that Mr. Horton said Mr. Valdez gave him. (RP

453-66). The photos Mr. Horton gave to the police were fingerprinted. (RP 1050). Detective Thoma's prints were found on some photos, unknown prints were found on some photos, and Mr. Valdez's prints were not found on any photos. (RP 1050).

Mr. Horton was at Mr. Valdez's house right before he was arrested. (RP 658, 1319). That night, he came back to Mr. Valdez' property with two friends and a flashlight. (RP 1319, 1331).

After Mr. Valdez was arrested, Mr. Horton contacted the power company and shut off power to his house. (RP 727). He did not have permission. (RP 727). He testified he did not turn off the power to get into Mr. Valdez's house and take anything related to the marijuana business; he did it because it was "drug house" and people that supported Mr. Valdez would congregate there and harass him, so he turned off the power so that they'd leave. (RP 744). However, he turned off the power right after Mr. Valdez was arrested. (RP 746). Later, Mr. Horton contacted the police and said that Howard Lashbrook, Leon Gollersrud, Katie Commons, and Tim Dalton were harassing him and making death threats. (RP 664).

Mr. Horton tried to locate Mr. Valdez's machine after he was arrested. (RP 743). On July 3rd, the day Mr. Valdez was arrested, Mr. Horton contacted Mr. Anderson to get Reece's phone number and then he

kept bugging him. (RP 1310). On July 28th, Mr. Horton texted Mr. Anderson that he cost him $140,000 or $160,000 in retirement, referring to the oil machine. (RP 668, 1303). Mr. Horton testified that he said that because he was hoping that would help him get the oil machine back. (RP 669). He testified that $160,000 was the cost of the machine. (RP 671). Mr. Anderson did not help him and their friendship ended. (RP 671). Mr. Horton testified that he wanted the machine so that Mr. Valdez could not make money in prison, not for his own use. (RP 743). Mr. Horton also texted Mr. Anderson,

> You and I don't like each other. That's fine. But FYI, if going to be contacted by Sam's defense team and a private investigator. They're trying to stir up anything they can. It is your right not to say anything at all. I'm hoping that's the position you will take. Don't believe anything they try to tell you.

(RP 1300).

Mr. Horton also sent a text to Glenn Trustee, which read, "Shamefully, you opted to talk to the private investigation about me. Why? To try to fuck me. That wasn't your wisest decision and I'm disappointed." (RP 672). Mr. Horton also contacted Mr. Seagar to tell him that he didn't have to talk to the defense investigators. (RP 673). Mr. Horton also texted Mr. Gollersrud's daughter, asking Mr. Gollersrud to disassociate himself from Mr. Valdez. (RP 1262-64).

9. Cross-Examination.

During the State's cross-examination of Mr. Valdez, the prosecutor commented on Mr. Valdez's veracity several times and was argumentative. (RP 1438, 1440). The court interrupted the cross-examination and excused the jury to say:

> A couple things. I did allow the questions about language in light of some earlier statements from the defendant. We've covered that issue sufficiently. He's not on trial because of his lousy language. Counsel, I was waiting for a lot more objections than were made. It's been a lot of argumentative statements stating answers back to the defendant, throwing "you can't possibly mean that" and "you can't expect the jury to believe." That has to stop.

(RP 1441).

Later, the State asked Mr. Valdez, "Is there anything else that is Chris's [Mr. Horton's] fault." (RP 1539). Mr. Valdez objected and the objection was sustained.

10. Closing Argument.

During closing arguments, the State improperly commented on defense witness, Mr. Adams, stating she thought it was shameful that he testified against his nephew, Mr. Horton:

> It's shameful. It's shameful, I suggest, as an uncle to come in here, and whatever his history is with Chris -- maybe Chris was -- well, he thinks that he treated Chris – he said Chris didn't have a father. Well, shame on you for coming in here and doing that. Even if it's true that he's the most terrible person on earth, shame on you.

(RP 1617).

The State also argued that Mr. Horton's credibility and inconsistencies were irrelevant and that defense counsel was trying to divert the jury from the real issues:

> It is not being diverted to other issues like did Chris have a bag of weed that he said that he didn't have bags of weed? Or was Chris a bad guy? Or, you know, he told people that he could get people killed? All of that is a diversion for you, because these are so damning that you have to do something.

(RP 1584). And:

> So Chris calls the police. And even if Chris called the police to get him in trouble -- oh. Either Chris called the police to go and steal from his house, or I guess we're supposed to believe that when he was walking up the driveway. Whatever. It doesn't change anything. So that is just like throwing a big rock right in the middle of your (inaudible). Hey, be careful cause Chris might have had a bad motive. It doesn't matter at all. It doesn't make anything he said on the stand more believable.

(RP 1589).

The State also misstated reasonable doubt:

> And I submit in this case that it's been made. A reasonable doubt is one for which a reason exists, not speculation, whether Chris went into a computer at his house or stole something. A reasonable doubt. Right? Not a possibility. Not a strike of lightning, but a reasonable doubt.

(RP 1615). And, the burden of proof:

> Well, the defendant -- they didn't prove anything. They say

> he cropped the pictures, which is evidence. That's not evidence. He didn't -- apparently you can just say you didn't do something. You can just take the stand and actually lie and say you didn't do something and never meant it anyway, and that's all it takes. That's not a reasonable doubt. None of that is a reasonable doubt.

(RP 1622-23).

## IV. ARGUMENT

### 1. Mr. Valdez Was Denied Due Process of Law Because There Was a Probability of Prejudice by Being Tried in Wahkiakum County Due to the Pre-Trial Publicity, Small Area, and the Number of Jurors Who Knew of the Case, Defendant, and/or Witnesses.

A trial court's ruling on a motion to change venue is reviewed for an abuse of discretion. *State v. Jackson*, 150 Wash.2d 251, 269, 76 P.3d 217 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Jackson*, 111 Wash.App. 660, 669, 46 P.3d 257 (2002). "[I]n exercising their discretion, trial courts must recognize . . . the principle that the right to a trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by jury, one or more of whose members is biased or prejudiced, is not a constitutional trial." *State v. Stiltner*, 80 Wash. 2d 47, 53, 491 P.2d 1043, 1047 (1971), citing *State v. Parnell*, 77 Wash.2d 503, 463 P.2d 134 (1969).

"Due process of law requires the granting of a motion for change of venue when a *probability* of prejudice is shown; actual prejudice need not be shown." *State v. Crudup*, 11 Wash. App. 583, 586–87, 524 P.2d 479, 482 (1974), citing *Stiltner*, 80 Wash.2d 47; *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

> Common criteria or factors generally utilized by courts in determining the propriety of an order granting or denying a motion for change of venue based on alleged prejudicial pretrial publicity are: (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

*Id.* at 587.

In *Stiltner*, our Supreme Court held that the defendant was entitled to a change of venue due to pre-trial publicity where the only local paper in Yakima County reported that lie detector tests eliminated all suspects other than the defendant and where the defendant was well-known. 80 Wash.2d at 49-51. The court also placed great weight on the fact that the

State commented on the defendant's guilt and the lie detector tests in the media. *Id.* at 53. The court held "that the probability of prejudice is so apparent that it was error not to grant the motion for a change of venue." *Id.* at 55.

In other cases, the State's improper release of information to the media did not necessitate a change of venue where the coverage was "not of an inflammatory nature" and where the defendant was not singled out. *Id.* at 53-54, citing *State v. Malone*, 75 Wash.2d 612, 614, 452 P.2d 963, 964 (1969); *State v. Valenzuela*, 75 Wash.2d 876, 454 P.2d 199 (1969).

a. *Inflammatory Nature of Publicity.*

The articles discuss that Mr. Valdez wanted to kill a judge, an attorney, and several other people (none of which is the basis of the charges Mr. Valdez faced at trial). (CP 27-28, 30-32). Other articles said that Mr. Valdez plotted to hire someone to kill his ex-wife and that he had a hit list, including two judges, according to a news release from the Sheriff's office. (CP 33-35). The articles also included details about Mr. Valdez's divorce that did not come in at trial. (CP 27). And, it included officers' opinions that Mr. Valdez had malice and that the recordings were "chilling." (CP 28).

b. *Circulation Throughout Community.*

There were at least twelve articles attached to Mr. Valdez's motion to change venue. Articles ran in the major local papers. And, this was a very small community. Additionally, it is clear that the publicity was widely circulated from the number of jurors who were familiar with the case and had read about it prior to jury selection.

c. *Length of Time Elapsed.*

There was not a lengthy period of time between the articles and jury selection, and some publicity continued up to and during jury selection. Jury selection began on February 1, 2016. (RP 64). The articles relating to this case were primarily published in July (CP 27-41), August (CP 42-44), and September (CP 45-47). So, at most, seven months before trial. One juror indicated they had read an article a couple weeks prior to trial. (RP 169). And, an article was published during jury selection. (RP 169).

*d. Care Exercised and Difficulty in Selecting a Jury.*

The trial court attempted to exercise care, and excused several jurors for cause. However, given the small community, the number of jurors who knew witnesses and/or the defendant, and the number of jurors who knew about the case from pre-trial publicity, it was difficult to pick a jury. Also, the court declined to do individual questioning. Therefore,

jurors who knew witnesses, had read pre-trial publicity, and had formed opinions, were questioned regarding their biases in front of other jurors.

*e. Familiarity of Jurors With Publicity and Its Effect.*

Most of the jurors in the pool had heard about the case in the media and/or knew witnesses involved in the case. Several of them were excused for cause because they did not believe that they could be fair and impartial. For example:

> PROSPECTIVE JUROR: I read the trial or I heard it on the radio. Read it in the paper.
>
> MS. BAUR: . . . Do you think it would affect how you listen?
>
> . . .
>
> PROSPECTIVE JUROR: I think it might for me. I know one of the victims that are a couple of houses up, so it would be hard for me. At first I thought maybe I could be impartial, but the more I've thought about it since the first day we came, I think it would be very difficult for me to be impartial and hear both sides fairly.

(RP 140-41). And, another juror or jurors expressed that they'd read about the case, discussed it with people who knew witnesses in the case, that those people were believable, and they believed that the charges were true. (RP 169-171).

It should be noted, these colloquies were done in front of the entire reaming venire; they were not done individually.

*f. For Cause and Peremptory Challenges by Defense.*

Mr. Valdez made numerous for cause challenges. In total, the court excused twenty-two jurors for cause, almost all due to their inability to be fair and impartial due to pre-trial publicity and/or personally knowing witnesses in the case. In addition, Mr. Valdez used seven peremptory challenges. And, Mr. Valdez renewed his motion to change venue throughout the jury selection process.

*g. Connection of Government Officials With Release of Publicity.*

The prosecutor and Sheriff both provided details about the case to the media. The articles indicate that prosecutor Dan Bigelow provided the media court documents related to the case. (CP 27). Wahkiakum County Sheriff Mark Howie made statements regarding the case to the media, including telling the media, although he had not heard the recordings himself, the investigators in the case were shocked at Mr. Valdez's malice. (CP 28). He is quoted as saying, "It doesn't even begin to tell you how chilling it is to hear the recordings. It's crazy." (CP 28).

*h. Severity of Charge.*

Mr. Valdez was charged, and convicted of, solicitation to commit murder in the first degree, in addition to other charges. Obviously, the nature of the charges were very serious.

*i. Size of Area.*

The size of the area in which Mr. Valdez's jury pool was selected was extraordinarily small. Mr. Valdez was charged and tried in Wahkiakum County. The population of the entire county is approximately 4,000 people.[3] To give some perspective, the population of the Pierce County is 843,954[4], the population of the city of Tacoma is 207,948[5], the University of Washington student body is 44,786[6], the population of the city of Fife is 9,970[7], there are 4,351 faculty members at the University of Washington[8], and the population of Stadium High School in Tacoma is 1,684[9].

Based on all these factors, the trial court erred by denying the motion to change venue. This is a case where the credibility of the witnesses was critical. The fact that this was a very small community,

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[3] Population 4,067 in 2014. Wahkiakum County Profile, by Scott Bailey, regional labor economist, Washington State Employment Security Department (updated February, 2016), available at https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profiles/wahkiakum-county-profile.
[4] United States Census Bureau, Pierce County, Washington, available at http://www.census.gov/quickfacts/chart/PST045215/53053,5370000.
[5] United States Census Bureau, Tacoma, WA, available at http://www.census.gov/quickfacts/chart/PST045215/5370000.
[6] University of Washington, Office of Admissions, available at https://admit.washington.edu/why-uw/about#the-student-body.
[7] United States Census Bureau, Fife, WA, available at http://www.census.gov/quickfacts/table/PST045215/5323795,00.
[8] University of Washington, Office of Admissions, available at https://admit.washington.edu/why-uw/about#general-information.
[9] US News & World Report, High Schools, available at http://www.usnews.com/education/best-high-schools/washington/districts/tacoma-school-district/stadium-21224.

most of the jurors had read about the case and/or knew witnesses involved, and there were details about the case and opinions from government officials in the media, Mr. Valdez was denied his constitutional right to due process of law by having his trial in Wahkiakum County.

2. There Was Insufficient Independent Evidence to Establish Corpus Delicti for Arson Absent Mr. Valdez's Statement; Therefore, the Trial Court Erred by Denying the Motion to Dismiss the Arson Charge.

A defendant may raise an objection to corpus delicti after the State rests, and after the defendant's statements have been introduced as evidence. *See State v. Aten*, 130 Wash.2d 640, 654, 927 P.2d 210 (1996); *State v. McConville*, 122 Wash. App. 640, 649, 94 P.3d 401, 406 (2004); *State v. Pietrzak*, 110 Wash. App. 670, 678, 41 P.3d 1240, *review denied*, 147 Wash.2d 1013, 56 P.3d 566 (2002). In this case, Mr. Valdez made a motion to dismiss the arson charge after the State rested, arguing that there was insufficient evidence to establish the corpus delicti for the charge of arson, absent Mr. Valdez's statements.

Proof of the corpus delicti of any crime requires evidence that the crime charged has been committed by someone. *State v. Hamrick*, 19 Wn. App. 417, 419, 576 P.2d 912 (1978). "[T]he defendant's confession or admission cannot be used to establish the corpus delicti [or] prove the

defendant's guilt at trial," unless there is independent evidence that a crime was committed. *Aten*, 130 Wash. 2d at 656.

> The confession of a person charged with the commission of a crime is not sufficient to establish the corpus delicti, but if there is independent proof thereof, such confession may then be considered in connection therewith and the corpus delicti established by a combination of the independent proof and the confession.

*Aten*, 130 Wash. 2d at 656, quoting *State v. Meyer*, 37 Wash.2d 759, 226 P.2d 204 (1951). Independent evidence cannot be established by other statements or confessions of the defendant. *Aten*, 130 Wash. 2d at 656-57.

"[T]he corpus delicti rule requires the State to present evidence that is independent of the defendant's statement and that corroborates not just a crime but the specific crime with which the defendant has been charged." *State v. Brockob*, 159 Wash. 2d 311, 329, 150 P.3d 59, 68 (2006), *as amended* (Jan. 26, 2007) (emphasis in original).

"The corpus delicti of the crime of arson consists of two elements: (1) that the building in question burned; and (2) that it burned as the result of the willful and criminal act of some person." *State v. Zuercher*, 11 Wash.App. 91, 93, 521 P.2d 1184, 1186 (1974); *see also* RCW 9A.48.020. In this case, it is clear that Mr. and Mrs. Cantrell's residence burned. The question is whether it was the result of a criminal act.

"Where a building is burned, the presumption is that the fire was

caused by accident or natural causes rather than by the deliberate act of the accused." *State v. Pfeuller*, 167 Wash. 485, 489, 9 P.2d 785, 786 (1932).

Motive may be considered in determining corpus delicti for arson. In *Zuercher*, the court found that anger to the alleged victims, threats to burn the building, and the defendant's presence in the area shortly before the fire established were sufficient for the admissibility of the defendant's statements under the corpus delicti rule. 11 Wash.App. at 94. In *Kindred*, the court found sufficient evidence where people were in the area, a gas can had been turn

ed over, and there was animosity towards the victim. *State v. Kindred*, 16 Wash. App. 138, 140, 553 P.2d 121, 123 (1976).

In this case, the trial court denied the motion to dismiss, finding that evidence of the fire, plus Mr. Valdez's statements, were sufficient. However, the trial court improperly considered Mr. Valdez's statements. The trial court was required to find that there was sufficient independent evidence to corroborate that a crime was committed, before considering his statements. In this case, there was not.

The fire investigation found the cause of the fire was undetermined. No witnesses saw Mr. Valdez in the area prior to the fire. There is no evidence connecting him to the fire. The only evidence, besides the statements that Mr. Horton testified that Mr. Valdez said and

his responses to Mr. Horton's statement on the recordings, was that Mr. Valdez was angry at Mr. and Mrs. Cantrell for testifying against him at the divorce trial. An undetermined cause of fire and a person who is upset with the homeowners is not sufficient to establish that a fire was intentionally set. Therefore, there was insufficient evidence of corpus delicti, absent Mr. Valdez's statements, and the charge of arson should have been dismissed.

3. There Was Insufficient Evidence to Convict Mr. Valdez of Possession of Marijuana With Intent to Manufacture or Deliver on July 3, 2015.

"The standard for determining whether a conviction rests on insufficient evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). "The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged." *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

In this case, the State had the burden to prove beyond a reasonable doubt that Mr. Valdez possessed marijuana on July 3, 2015, with the intent

to manufacture or deliver marijuana. RCW 69.50.401; (CP 494). Possession with intent to manufacture or deliver requires more than just possession of a large quantity of marijuana. *State v. Campos*, 100 Wash. App. 218, 222, 998 P.2d 893, 895 (2000).

Mr. Valdez was arrested on July 3, 2015. Marijuana oil was found in his residence and shop. However, at the time, he had sold his machine to Vancouver Weed and it was no longer on his property. He told the police that he was no longer involved in illegal marijuana. All the testimony regarding Mr. Valdez's marijuana business was related to activities before he sold his machine to Vancouver Weed. Therefore, there was insufficient evidence that on that particular day he intended to manufacture or deliver the marijuana that was on his property.

4. The Trial Court Erred By Allowing the State to Introduce Prior Bad Acts.

The trial court improperly admitted allegations that Mr. Valdez wrecked his plan and car, that he wanted to set the Bruneau's catamaran on fire, and that he clogged a culvert as evidence without making any findings that these acts occurred, the basis for admitting them, their relevance, or weighing the probative value and prejudice. This evidence was objected to.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wash.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993). However, appellate courts review the interpretation of evidentiary rules de novo. *State v. DeVincentis*, 150 Wash.2d 11, 17, 74 P.3d 119 (2003).

Mr. Valdez objected to the evidence of the plane crash, car crash, plans to burn the Bruneau's catamaran, and clogging the culvert as irrelevant.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. Evidence is not admissible if it is not relevant. ER 402. The evidence was not relevant to whether or not Mr. Valdez committed the crimes of arson or solicitation to commit murder in this case.

There is a presumption that prior bad acts are not admissible. *State v. DeVincentis*, 150 Wash. 2d 11, 17, 74 P.3d 119, 123 (2003); ER 404(b).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

> preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). The State has a substantial burden to overcome the presumption of inadmissibility. *DeVincentis*, 150 Wash. 2d at 17.

> In order to admit evidence of a prior bad act, the court must:
>
> (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.

*State v. Kilgore*, 147 Wash. 2d 288, 292, 53 P.3d 974, 976 (2002), citing *State v. Pirtle*, 127 Wash.2d 628, 649, 904 P.2d 245 (1995). "When the other acts are uncharged offenses, they must have substantial probative value." *State v. Baker*, 89 Wash. App. 726, 736, 950 P.2d 486, 491 (1997). To justify admission of the evidence, the trial court must conduct this balancing on the record. *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984).

While prior bad acts may be admissible to prove motive, the prior bad acts in this case were not relevant or necessary to prove motive. *State v. Powell*, 126 Wash. 2d 244, 259, 893 P.2d 615, 624 (1995) (prior arguments and assaults of alleged victim admissible to prove motive in murder case). In this case, there was already evidence that Mr. Valdez

was upset about the divorce, his ill-feelings towards his ex-wife, and his anger towards Mr. and Mrs. Cantrell. Thus, the relevance or probative value of the plane crash, car accident, and allegations of wanting to burn the Bruneau's catamaran and clog their culvert was limited at best, and outweighed by the risk of undue prejudice.

Admission of prior bad acts requires "substantial similarity" between the prior act(s) and the charged crime *and* they must be part of the same general plan. *DeVincentis*, 150 Wash. 2d at 21. "[W]hen identity is at issue, the degree of similarity must be at the highest level and the commonalities must be unique because the crimes must have been committed in a manner to serve as an identifiable signature." *Id.*, citing *State v. Thang*, 145 Wash.2d 630, 643, 41 P.3d 1159 (2002).

In this case, Mr. Valdez admitted that there was a car accident and a plane crash, but not that they were due to his anger about his divorce. The allegations regarding burning the Bruneau's catamaran and clogging the culvert were based solely on Mr. Horton's testimony. The trial court later noted that Mr. Horton was not credible. The trial court never made any finding that these acts were proved by a preponderance of the evidence. Even if this court finds that the allegations regarding planning to burn the Bruneau's catamaran, which never happened, are evidence of a common scheme or plan, it was not substantially similar to the arson or the

solicitation charge and there is nothing about it that is unique. Otherwise, they were used to show motive for the arson and solicitation to commit murder and to simply make Mr. Valdez look bad. They were not relevant to the charges, especially the plane crash and car crash. And, they were highly prejudicial, while their probative value was limited, especially where there was other evidence in the record regarding Mr. Valdez's anger about the divorce. The trial court never weighed the prejudice and probative value. Therefore, the trial court erred in admitting the evidence of prior bad acts.

5. Prosecutorial Misconduct.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983).

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Glasmann*, 175 Wash. 2d 696,

703-04, 286 P.3d 673, 677 (2012); *State v. Davenport,* 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn.App. 895, 106 P.3d 827 (2005).

> Generally, improper prosecution argument, even when indirectly touching upon a constitutional right, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice . . . . However, if the alleged misconduct is found to directly violate a constitutional right . . . then "it is subject to the stricter standard of constitutional harmless error."

*State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (internal citations omitted).

a. *The State Misstated the Burden of Proof and Reasonable Doubt.*

It is improper for a prosecutor to misstate the burden of proof. *See State v. Johnson*, 158 Wn.App. 677, 685, 243 P.3d 936 (2010). In *Johnson*, the State misstated the burden of proof in its closing argument, arguing that in order to find the defendant not guilty, the jurors had to have a reason to doubt and implied that the jurors must convict unless they had a reason not to. *Id.* Defense counsel neither objected nor requested a curative instruction. *Id.* at 683. However, the court held that this

argument was "flagrant, ill-intentioned and incurable by a trial court's instruction in response to a defense objection." *Id.* at 685. "[A] misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.* at 685-86, citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *State v. Anderson*, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)). Therefore, the court held that the argument constituted prosecutorial misconduct and reversed the conviction. *Id.* at 686.

In this case, the State argued that reasonable doubt is not speculation, not a possibility, not a strike of lightening, not whether Mr. Horton could have gone into Mr. Valdez's house and printed a picture of Ms. Robbins to frame him. (RP 1615). This argument improperly conflates a strike of lightening, with the real possibility that Mr. Horton, who was regularly at Mr. Valdez's house and helped him with his marijuana business, who had motive and bias towards Mr. Valdez due to not being involved in the marijuana business to the extent that he wanted to be, and who may have been motivated to get Mr. Valdez's machine and take over his business, was able to get a photo off of Mr. Valdez's computer to frame him. If a jury finds that it was possible that Mr. Horton

might have obtained the photo from Mr. Valdez's computer, that would create a reasonable doubt. Therefore, the State's argument was improper.

Also, the State argued that Mr. Valdez did not prove anything. Mr. Valdez, of course, has no burden to prove anything and it is improper to suggest he does. The State also argued that Mr. Valdez's denials and testimony that he was no serious about killing his wife are not reasonable doubt. The State argued, "You can't just take the stand and actually lie and say you didn't do something and never meant it anyway, and that's all it takes. That's not reasonable doubt. That's not reasonable doubt." (RP 1622-23). Again, that is a misstatement reasonable doubt. The jurors are the sole judges of the credibility of witnesses, and if the jurors find Mr. Valdez credibility, or even if his denials create doubt, then the jury is not only allowed to, but is required to acquit. Therefore, the State's arguments that a defendant's denial is not reasonable doubt is a misstatement of the law.

Although counsel did not object to these arguments at trial, this court should consider them for the first time on appeal because a misstatement of the burden of proof and reasonable doubt is flagrant and ill-intentioned. And, in this case, where the credibility of the witnesses was at issue and the trial court even commented on the juvenile nature of

the records and Mr. Horton's lack of credibility, this improper argument likely prejudiced Mr. Valdez.

b. *The State Improperly Argued Its Personal Opinion, Calling Mr. Valdez a Liar, and Calling a Defense Witness Shameful.*

The Rules of Professional Conduct state: "A lawyer shall not . . . in trial, . . . state a personal opinion as to . . . the credibility of a witness, . . . or the guilt or innocence of an accused." RPC 3.4(e). It is reprehensible for a prosecutor to give his or her personal opinion on a defendant's guilt in closing argument. *State v. Reed*, 102 Wash. 2d 140, 146, 684 P.2d 699, 702 (1984). In *Reed*, our Supreme Court reversed a murder conviction where the prosecutor, in closing argument, called the defendant a liar, stated that that defense counsel did not have a case, and said the defendant was clearly a "murder two." *Id.* at 145-48.

In this case, the prosecutor called Mr. Valdez a liar. She argued, "You can't just take the stand and actually lie and say you didn't do something and never meant it . . . ." (RP 1622-23). Mr. Valdez was recorded having conversations about killing his ex-wife. His defense was that he was not serious and he never followed through. His credibility and Mr. Horton's credibility were crucial in this case. Therefore, the State's improper argument, stating her opinion that Mr. Valdez lied on the stand, was not only improperly, but particularly prejudicial.

In addition, the State improperly commented on defense witness, Mr. Adams, stating she thought it was shameful that he testified against his nephew, Mr. Horton, saying " It's shameful. It's shameful . . . . Well, shame on you for coming in here and doing that. Even if it's true that he's the most terrible person on earth, shame on you. (RP 1617).

c. *The State Improperly Impugned Defense Counsel.*

It is improper for the State to impugn defense counsel. "Prosecutorial statements that malign defen[s]e counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *State v. Lindsay*, 180 Wash. 2d 423, 432, 326 P.3d 125, 130 (2014), quoting *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir.1983) (per curiam). It is improper for the State to argue that defense counsel is using slight of hand or argue that the defense theory is a "crock." *State v. Thorgerson*, 172 Wash. 2d 438, 451, 258 P.3d 43, 50 (2011); *Lindsay*, 180 Wash. 2d at 433.

In this case, the State argued that the jury should not be diverted by issues related to Mr. Horton's credibility. She argued, "All of that is a diversion for you, because these [recordings] are so damning that you have to do something." (RP 1584). She also argued that the defense arguments that Mr. Horton was biased and tried to get Mr. Valdez's machine are "like throwing a big rock right into the middle of your (inaudible)." (RP

1589). She also argued that the defense argument that Mr. Horton could have gotten the photos of Ms. Robbins and her house off of Mr. Valdez's computer was as likely as a "strike of lightening." (RP 1615). These arguments all impugned defense counsel, implying that the defense was trying to trick the jury, divert their attention, and raise impossible defenses because the evidence was so harmful. These arguments were improper and highly prejudicial, given the facts in this case.

d. *The State Improperly Told the Jury That Mr. Valdez Was Incarcerated.*

It is reversible error for a defendant to appear in front of a jury in shackles because it denies the defendant a fair and impartial trial under the Sixth and Fourteenth Amendments to the United States Constitution. *State v. Clark*, 143 Wash. 2d 731, 773, 24 P.3d 1006, 1027 (2001); *State v. Finch*, 137 Wash.2d 792, 842, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); U.S. CONST. amend. VI, XIV. Also, the admission of booking photos can also be improper because it can prejudice a defendant. *State v. Sanford*, 128 Wash. App. 280, 286, 115 P.3d 368, 371 (2005); *State v. Henderson*, 100 Wash. App. 794, 803, 998 P.2d 907 (2000). For the same reasons, it is prejudicial for the jury to know that a defendant is incarcerated during trial.

In this case, the prosecutor attempted to impeach Ms. Gollersrud by questioning him about visiting Mr. Valdez in jail. (RP 1286). The State asked Mr. Gollersrud if he visited Mr. Valdez in jail in 2016; he responded that he visited Mr. Valdez in 2015, not 2016. (RP 1286). The fact that Mr. Valdez was in jail was not in evidence and it was improper and prejudicial for the prosecutor to tell the jury that he was incarcerated. Although Mr. Valdez did not object, the misconduct was flagrant and ill-intentioned and could not have been cured by an objection after the jury heard the State's question.

6. Mr. Valdez Received Ineffective Assistance of Counsel Because Counsel Failed to Properly Object to the Admissibility of His Statements Regarding Arson, the Admission of Prior Bad Acts, the State's Improper Closing Arguments, or the State's Question Regarding Mr. Valdez Being in Jail.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney

includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

In this case, defense counsel did not object to the admissibility of Mr. Valdez's statements regarding arson prior to trial, but waited to make a motion to dismiss after the State rested. Therefore, the jury heard those statements and could consider them when deliberating on the other counts. Because there was not sufficient independent evidence of arson, counsel should have objected before trial. Given the other charges, it was unreasonable for counsel to fail to object to the admissibility of his statements regarding the arson.

Defense counsel did object to the admissibility of the plane crash, car crash, allegations about wanting to burn the Brunueau's catamaran, and clog a culvert as irrelevant, but counsel did not object under ER 404(b). Failure to also object to prior bad acts was error.

Also, defense counsel did not object to the State's misstatement of the burden of proof and reasonable doubt in closing argument, her calling Mr. Valdez a liar, saying Mr. Adams was shameful, or her impugning defense counsel. The arguments were clearly improper and highly

prejudicial. It was not reasonable to fail to object to the State's improper closing arguments.

Finally, defense counsel did not object to the State's question to Mr. Gollersrud about visiting Mr. Valdez in jail; thereby telling the jury that Mr. Valdez was incarcerated. Mr. Valdez's incarceration was irrelevant, not in evidence, and was prejudicial. Therefore, it was not reasonable to fail to object.

7. The Cumulative Error Denied Mr. Valdez a Fair Trial.

Even if the individual errors during trial do not require reversal, reversal is required if the cumulative effect of the errors denied the defendant a fair trial. See, e.g., *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

All of these errors stated above prejudiced Mr. Valdez. This was a case that relied, in large part, on an informant. An informant who had motivation to implicate Mr. Valdez, to get him out of the way, and try to take over his business. Mr. Horton clearly wanted to be business partners with Mr. Valdez and was angry when he felt he was being cut out of the business and Mr. Valdez was working with other people. Even the trial

judge commented that Mr. Horton was not credible. After some angry texts, Mr. Horton went to the police. At first, he only called about the marijuana business, but after several calls and waiting for the police to respond, he added that Mr. Horton wanted to kill his ex-wife and had burned down the Cantrell's house.

Although there are wire recordings, in addition to Mr. Horton's testimony, the recordings are open to different interpretations. Mr. Horton is the one who consistently brings up killing Ms. Robbins and the arson; Mr. Valdez simply responds. The trial judge noted, the recordings sound like teenagers trying to pump each other up. Mr. Valdez testified that he never intended to kill his ex-wife; that he was just playing along with Mr. Horton, like when you talk about something you know will never happen. That is consistent with their talking about their "plans" to rob drug dealers, which clearly was fantasy, not reality.

On the recordings, there was never any agreement to follow through, no clear exchange of money. Mr. Horton testified that Mr. Valdez gave him a picture of Ms. Robbins and her house, but the only conversation about paperwork on the recordings was while they were talking about getting paperwork from the county and measure Mr. Valdez's property lines. Mr. Horton said that Mr. Valdez gave him oil as payment for his uncle to get a plane ticket and come kill Ms. Robbins.

However, there had also been conversations about Mr. Horton's uncle getting involved in the marijuana business. Mr. Valdez testified that he gave the oil to Mr. Horton for his uncle to distribute; not for payment for murder.

In a text message on May 12, 2015, Mr. Horton texted Mr. Valdez to say that the reason he came over that morning was because his uncle wants to come to town for a full order of two juices, or oil. (RP 1396). Then, on June 23, 2015, Mr. Valdez gives Mr. Horton oil for his uncle and in that conversations there is a discussion about a plane ticket. Mr. Valdez testified that the oil was for the uncle to get involved in the marijuana business, which is consistent with the text that Mr. Horton sent. Mr. Horton testified that it was for the murder of Ms. Robbins. On the wire, Mr. Horton says, "I'll purchase the plane ticket and it will be a done deal and I'll put his thing in the mail. He'll reimburse me when he gets here." (RP 592). If Mr. Valdez gave Mr. Horton oil to pay for the uncle's plane ticket, as Mr. Horton claims, there is no reason his uncle would be reimbursing him for the plane ticket. On the wire, Mr. Horton says, "I'll purchase the plane ticket and it will be a done deal and I'll put his thing in the mail. He'll reimburse me when he gets here." (RP 592). If Mr. Valdez gave Mr. Horton oil to pay for the uncle's plane ticket, as Mr.

Horton claims, there is no reason his uncle would be reimbursing him for the plane ticket.

Mr. Horton was at Mr. Valdez's the morning he was arrested, he went back on the property that night, with two friends and flashlights, and then he repeatedly contacted Mr. Anderson, trying to get the oil machine. He turned off the power to Mr. Valdez's property, without permission. He also contacted several witnesses and discouraged them from cooperating with the defense. And, he talked to Mr. Gollersrud about using his cannery to start his own marijuana business. Clearly, Mr. Horton was biased and had motivation to set up Mr. Valdez.

Given the bias of Mr. Horton and the different possible interpretations of the statements on the wire recordings, the errors in this case were highly prejudicial and likely effected the outcome in this case. Therefore, for all the reasons stated above, this court should reverse the convictions and remand for a new trial.

8. The Trial Court Improperly Imposed Legal Financial Obligations Without Adequately Taking Into Consideration Mr. Valdez's Ability to Pay.

A trial court must inquire about a defendant's ability to pay before imposing legal financial obligations (LFOs).

> RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the

> court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

*State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015).

> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.,* if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

*Id.* at 838-39.

In this case, the trial court found that Mr. Valdez had the ability to pay legal financial obligations and imposed a total of $2,136.25 plus restitution, which was to be determined on the arson charge. (RP 1657, CP 566). The court made this finding based on the trial testimony regarding Mr. Valdez's marijuana business and properties. The testimony at trial also included the fact that Mr. Valdez borrowed money to buy the oil extraction machine in this case, had to pay his ex-wife a large amount of money as part of the divorce decision, and the possibility that he would

have to pay not only his attorney, but her attorney, for the cost of the appeal in his divorce case. (RP 239-40, 411-12, 1168). Also, the trial court did not ask or take into question how much Mr. Valdez spent on his legal representation in this case.

Furthermore, the trial court found that Mr. Valdez was indigent for purposes of this appeal. (Order of Indigency, CP 572-75). And, the court sentenced Mr. Valdez to 250 months in prison. (RP 1656, CP 541). So, obviously, he will not be working or have any income.

Given that Mr. Valdez was found indigent, the presumption is that he cannot pay legal financial obligations. And, his lengthy sentence makes his ability to pay even less likely. The trial court failed to take his indigency and lenthgy incarceration into consideration, and relied on assets Mr. Valdez previously had, without considering his outstanding debts and legal fees. Therefore, the trail court erred in imposing legal financial obligations without adequately considering his ability to pay.

9. This Court Should Not Impose Appellate Costs Because Mr. Brown is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90,

367 P.3d 612, 616 (2016); *see also* RAP 14.2[10], 14.1(c)[11].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina
> —e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

*Sinclair*, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

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[10] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review*." RAP 14.2 (emphasis added).
[11] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Valdez was found indigent and counsel was appointed for this appeal. (Order of Indigency, CP 572-75). Mr. Brown was sentenced to 250 months, or over 20 years, in prison. (RP 1656, CP 541). At the time of trial, Mr. Valdez was 63 years old. (RP 1205). Although Mr. Valdez owns property and has assets, given the length of his incarceration and his age, it is extremely unlikely that Mr. Brown will be able to pay any appellate costs after his release from prison. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Brown does not substantially prevail.

## V. CONCLUSION

In conclusion, Mr. Valdez was denied due process when the trial court did not grant his motion for a change of venue out of Wahkiakum County, a small county where most of the jurors had read pre-trial publicity and/or knew witnesses in the case. Also, Mr. Valdez was denied a fair trial due to prosecutorial misconduct, ineffective assistance of counsel, and the cumulative error. Therefore, this matter should be reversed and remanded for a new trial. In addition, there was insufficient evidence to convict Mr. Valdez of arson and possession of

marijuana with intent to manufacture or deliver. Therefore, those charges should be dismissed. Also, Mr. Valdez's sentences should be reversed remanded for proper consideration of his ability to pay legal financial obligations.

Dated this 11th day of October, 2016.

Respectfully Submitted,

JENNIFER VICKERS FREEMAN
WSBA# 35612
Attorney for Appellant, Samuel Valdez

# PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

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| | |
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| STATE OF WASHINGTON,<br><br>Respondent,<br>vs.<br><br>SAMUEL VALDEZ,<br><br>Appellant. | NO. 48740-3-II<br><br>CERTIFICATE OF SERVICE |

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary E. Benton

Signed October 11, 2016 at Tacoma, Washington.



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